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January 12, 2011

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: *Indiana Southwestern Railway Co. – Abandonment Exemption – In Posey and Vanderburgh Counties, IN*, STB Docket No. AB-1065X

EXPEDITED CONSIDERATION REQUESTED

Dear Ms. Brown:

228626

Attached hereto is a Supplement to Indiana Southwestern Railway Co.'s ("ISW") Appeal and Motion to Hold in Abeyance of December 30, 2010 ("Appeal and Motion". The attached Supplement offers information on important new developments bearing on both the merits and the propriety of the Board's acceptance and continued handling of the Town of Poseyville's Offer of Financial Assistance in this proceeding, and it urges the Board to act expeditiously on the Appeal and Motion.

If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Sincerely,

William A. Mullins/RW

William A. Mullins

Enclosures

cc: J. Michael Carr
Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

STB Docket No. AB-1065X

**INDIANA SOUTHWESTERN RAILWAY CO.
- ABANDONMENT EXEMPTION -
IN POSEY AND VANDERBURGH COUNTIES, IN**

SUPPLEMENT TO APPEAL AND MOTION TO HOLD IN ABEYANCE

EXPEDITED CONSIDERATION REQUESTED

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January 12, 2011

**Attorneys for Indiana Southwestern
Railway Company**

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

STB Docket No. AB-1065X

**INDIANA SOUTHWESTERN RAILWAY CO.
- ABANDONMENT EXEMPTION -
IN POSEY AND VANDERBURGH COUNTIES, IN**

SUPPLEMENT TO APPEAL AND MOTION TO HOLD IN ABEYANCE

EXPEDITED CONSIDERATION REQUESTED

In a recent filing entitled as an "Appeal and Motion to Hold in Abeyance" (the "Appeal and Motion"), Indiana Southwestern Railway Company ("ISW") requested, among other things, that the Board review and reverse a prior decision in this proceeding in which the Director of the Office of Proceedings (the "Director") found the Town of Poseyville (the "Town" or "Poseyville") to be a financially responsible party eligible to pursue an Offer of Financial Assistance ("OFA") for the purchase of the 17.2-mile rail line (the "Line") that is the subject of the above-docketed abandonment proceeding. ISW indicated in its Appeal and Motion that it intended as soon as possible to supplement the record in this proceeding with further evidence on the issue of the Town's financial responsibility and on related issues. On the basis of the additional information set forth below, ISW urges the Board to protect against the abuse of its processes and to reverse the Director's earlier findings that have permitted the subject OFA to go forward. For reasons supplied below, ISW also urges the Board to act quickly on the Appeal and Motion in order that ISW may be protected against the otherwise avoidable and unnecessary costs of addressing Poseyville's highly questionable OFA.

BACKGROUND

Pertinent background on this proceeding was set forth in ISW's December 30 Appeal and Motion, and that background is hereby incorporated into this Supplement by reference. Suffice to reiterate here that, in the Director's December 23, 2010 decision accepting the Town's OFA, the Director stated that ISW had offered insufficient evidence to rebut the presumption that the Town, a governmental entity, was financially responsible. ISW served discovery upon Poseyville on December 23, 2010, seeking information concerning, among other things, whether Poseyville possessed adequate resources to purchase the Line, whether it was relying on any third party to provide the necessary funding for the OFA (and, if so, who), and whether Poseyville had the resources to restore the Line to service and to ensure the availability of rail service into the future.

Very shortly thereafter, on December 30, 2010, ISW filed its Appeal and Motion, to which ISW attached a copy of its recently-served discovery requests. The Appeal and Motion challenged the basis for the Director's decision accepting Poseyville's OFA and allowing the proceeding to go forward. ISW advised that it anticipated substantive responses to its discovery requests within the next few days, and urged the Board not to take adverse action on the appeal until ISW had the information it expected to receive through discovery.

According to the STB's regulations and in keeping with ISW's explicit request, the Town's responses to ISW's discovery were due on January 7, 2011. To date, however, ISW has received no formal response whatsoever from the Town. (In the interest of full disclosure, during informal discussions between the parties late last week, counsel for Poseyville remarked, vaguely, that he planned to respond to ISW's discovery requests "next week," disregarding the fact that his client's responses were due at the end of last week – January 7.) ISW contemplated filing a motion to compel responses to its discovery requests, but it understands that, if it had initiated such a process,

the discovery dispute would not be resolved until well after the statutory due date for requests to set terms and conditions for the purchase of the Line.¹

Finally, on January 11, 2011, the Town advised that it did not wish to negotiate a mutually acceptable purchase price for the Line, or to continue discussing alternatives to the OFA process. At that time, the Town alerted ISW that it will file a request for the Board to prescribe terms and conditions for the purchase of the Line.

ARGUMENT

As the Board must appreciate, the OFA process subjects both parties, and potentially the Board itself, to substantial costs. Because the offeror (Poseyville) can at any time following good faith negotiations² file a request to set terms and conditions for the sale of the Line, ISW must act quickly to be able within five calendar days of the filing of such a request to provide ISW's best evidence of the Line's net liquidation value. As the OFA statute, regulations, and STB policy make clear, the Board will not permit an OFA to go forward where the offeror lacks adequate resources to purchase the targeted line, has not demonstrated a genuine need for rail service, or where the offeror is engaging in the OFA process for inappropriate purposes (such as to speculate on the line's future net liquidation value, to thwart local planning and development objectives, or to block possible

¹ Once the January 7 due date for Poseyville's responses to ISW discovery came and went without word from the Town, ISW could have, in theory at least, opted to file a motion to compel with the Board on the next business day – Monday, January 10. But it appears to ISW that such a motion to compel would be a pointless exercise. Even if, ISW had filed a motion to compel on January 10, then, under the applicable Board rules (49 CFR 1114.31(a)(1) and 1104.13(a)), Poseyville would have had 20 days (until January 31 in this case) to reply. But under that scenario, Poseyville's reply to the motion to compel, and, for that matter, the Board's ruling on the discovery dispute would not become available until *well after* the January 19 deadline for filing a request to set OFA terms and conditions. ISW's appeal of the Director's decision, and ISW's related efforts at swiftly-completed discovery are intended to demonstrate that continuing the OFA process is unjustified, unnecessary, and a burden to ISW and the Board alike. ISW's efforts to make its case for stopping the OFA process mean nothing if those efforts are effectively overtaken by the OFA procedures themselves.

² ISW believes that Poseyville has not negotiated in good faith. In fact, although it is entirely unclear why it has designed to do so, Poseyville's conduct here has consistently signaled its intent to push the OFA process directly to a request to set terms and conditions.

interim trails use for the line's right-of-way). Yet, in this case, the Board seems to be allowing such an abuse of its process in the face of undisputed allegations that Poseyville's use of the OFA process is not legitimate.

To protect its interests, ISW has already procured the services of STB counsel and track salvage and land valuation experts, each of which it has used and will continue to use in the event the Board does not put a stop to the OFA process. ISW's experts are working apace, at considerable cost to ISW, to be ready in the event that the Town files, along with the requisite filing fee, a request to set terms and conditions. But ISW has very good reason to believe, as should the Board, that the substantial costs ISW is incurring are the by-product of a bogus OFA. ISW is convinced, but hasn't the evidence to prove at this point – *absent timely responses to its discovery requests* – that Poseyville lacks the resources itself to purchase the Line, that Poseyville's leaders have not officially endorsed the OFA, and (to make matters worse) that Poseyville is serving as a proxy for a third party or parties that possess no genuine interest in continued rail service, but rather who wish to use the OFA process for purposes not sanctioned under the OFA statute.

It is extremely curious that Poseyville has never bothered to address or refute any of ISW's very serious allegations. Poseyville has thus far failed to reply to ISW's Appeal and Motion, and it has ignored ISW's discovery requests. Instead, aided by the Director's presumption of financial responsibility, the Town has remained strangely silent, and, in so doing, has succeeded for the moment in forcing the OFA process along.

In its Appeal and Motion, ISW acknowledged the regulatory basis for the Director's decision to accept Poseyville's OFA. Poseyville is a governmental entity that, by regulation, is presumed to be financially responsible. The Director, in accepting the Town's OFA, stated that "ISW has not offered sufficient specifics to rebut the Board's presumption." The upshot of that statement, of course, is that the Board's presumption may be rebutted upon presentation of

substantive evidence to the contrary, and ISW has endeavored through appropriate steps to obtain and present such evidence.

But Poseyville has thus far thwarted ISW's efforts under the Board's rules to obtain evidence critical to ISW's ability to rebut the presumption. Poseyville's refusal to cooperate with discovery reflects an obvious contempt for the Board's processes. It also suggests that, if Poseyville *had* responded honestly and completely to ISW's discovery requests, ISW could prove that the Town lacks the resources to undertake the Line's purchase, is pursuing the OFA for illegitimate purposes, or both. Such blatant disregard for the Board's processes, particularly when the end result is so clearly intended to prejudice ISW, cannot be sanctioned.

Seeking a Board resolution to the pending discovery dispute would be unavailing to ISW, and Poseyville is doubtlessly aware of this, too. The strict deadlines governing the OFA mean that the vast majority of the costs that ISW must incur to protect its interests will be incurred before the Board would, under its usual procedures, have to rule on a motion to compel. ISW would be able to demonstrate that the OFA process should be stopped only after most or all of that process has already run its course. For this reason, the Board must act very quickly to protect against further abuse of its processes and to shield ISW and the Board from otherwise avoidable and unnecessary expenditure of resources.³ In short, the Board must deem Poseyville's refusal to cooperate with discovery entirely as a *tacit admission that it is either financially unfit or that it has invoked the OFA process for inappropriate purposes or both*. In no case should the Board enable parties like

³ As explained above, Poseyville has already indicated to ISW that it intends shortly to file a request to set terms and conditions for the sale of the Line. Because there is substantial doubt that Poseyville is financially responsible or that its OFA is for legitimate purposes, Board action on such a request to set terms and conditions would be a waste of the agency's limited resources, especially if it later came to light (as ISW strongly suspects it will) that ISW was correct on any of its allegations. Accordingly, Poseyville's failure to respond to discovery is prejudicial to both ISW and to the Board itself.

Poseyville selectively to invoke Board processes and yet refuse to comply with the rules and regulations that govern thereafter.

ISW observed in its Appeal and Motion that the Board has been vigilant in past cases to ensure that its OFA processes are not abused, citing, for example, CSX Transportation Inc. – Abandonment Exemption – In Glynn County, GA, STB Docket No. AB-55 (Sub-No. 697X), slip op. at 3 (STB served Jul. 9, 2009), and Union Pacific Railroad Company – Abandonment Exemption – In Lassen County, CA, And Washoe County, NV, STB Docket No. AB-33 (Sub-No. 230X), slip op. at 2 (STB served Sept. 19, 2008) (footnote omitted). Especially in light of Poseyville's refusal to answer discovery requests and the presence here of serious allegations concerning the legitimacy of Poseyville's invocation of the OFA process, the Board must apply the standards set forth in the aforementioned cases and bar Poseyville's continued access to the Board processes.

By flaunting the Board's discovery processes, Poseyville is purposefully preventing ISW from obtaining evidence to show that the Town is not a financially responsible party, and that it is invoking the OFA processes for inappropriate purposes. Poseyville's conduct here is highly prejudicial, and it serves to perpetuate a costly OFA processes that really ought to be stopped. For those reasons alone, the Board should overturn the Director's previous decision allowing Poseyville's OFA to go forward. An entity that has acted in bad faith to the prejudice of an opposing party, as the Town has done here, should not be afforded any of the presumptions to which it might otherwise be entitled. Poseyville's utter bad faith in ignoring altogether appropriately-tendered discovery requests should not be rewarded. Rather, the Board should under the circumstances here deem Poseyville's refusal to comply with the Board's discovery rules as an admission of the allegations raised by ISW, and, accordingly, the Board should terminate this OFA process immediately.

REQUEST FOR EXPEDITED HANDLING

Once an OFA process is initiated, the Board and the parties to the OFA are constrained by the tight timeframes set forth in 49 U.S.C. 10904, unless, of course, the Board puts a stop to the OFA process to protect against the abuse of its processes. Because of the tight timeframes in section 10904, an entity such as ISW must take swift action to be able to make the best case that it can for the targeted rail line's valuation and to thereby protect its interests. In this case, to protect its interests, ISW has, as abandoning railroads frequently do in such cases, procured the services of STB counsel and experts on track salvage valuation and property valuation in the event that ISW must very quickly respond to a request to set terms and conditions. And Poseyville has assured ISW that it will file such a request to set terms and conditions soon. This undertaking is all very costly to ISW, and ISW's costs mount by the day as this process rolls along. But these costs can and should be avoided, because ISW (through its allegations) and Poseyville (through its actions) have cast sufficient doubt on the legitimacy of the OFA for the Board to put a stop to that process. In the interest of shielding itself from the substantial costs of the OFA process, the propriety of which is, at best, in doubt here, ISW urges the Board to act expeditiously on ISW's Appeal and Motion, to reverse the Director's December 23 decision, and to stop this OFA process.

CONCLUSION

ISW faces a conundrum. It cannot rebut the Board's presumption of Poseyville's financial responsibility without evidence to the contrary, and without evidence, ISW also cannot prove that the Town is invoking the OFA process for inappropriate purposes (even though ISW has very good reason to believe that this, too, is so). Poseyville could have resolved this situation by offering a candid account of itself, but it has chosen to keep quiet, refusing to this point even to respond to ISW's previously-filed Appeal and Motion. To protect its interests and to enable the Board to better weigh the validity of Poseyville's OFA, ISW has had no choice to pursue the evidence it (and the

Board) needs through discovery. But Poseyville has totally ignored ISW's discovery requests. Thus, ISW in the same place it was when Poseyville filed its OFA in the first place, and the Town knows this full well. Worse, if bound by the Board's usual discovery dispute process, by the time that process will have run its course, the information ISW needs to make its case against permitting the OFA to go forward will be for naught.

The Board can and should promptly resolve this issue. It cannot and should not reward Poseyville's willful decision to ignore discovery. Moreover, Poseyville's conduct should be recognized for what it is – purposeful disregard of the Board processes to the detriment of an opposing party and to the Board itself. The Board cannot sanction Poseyville's behavior by permitting the OFA process in this proceeding to continue. Rather, ISW urges the Board, under the circumstances that have developed here, to revisit the Director's decision accepting Poseyville's OFA, and to deem the presumption of Poseyville's financial responsibility to be rebutted. In short, the Director's December 23 decision in this proceeding should be reversed.

Respectfully submitted,



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Attorneys for Indiana Southwestern
Railway Company

January 12, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Supplement to Appeal
And Motion To Hold In Abeyance by mailing copies of the same via prepaid first class mail to
all parties of record in these proceedings or by more expeditious means of delivery.

Dated at Washington, D.C. this 12th day of January, 2011.


Robert A. Wimbish
Attorney for Indiana Southwestern
Railway Company